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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-201

CITY OF RICHMOND, VIRGINIA,

Appellant,

v.

UNITED STATES OF AMERICA and
WILLIAM B. SAXBE, ATTORNEY GENERAL, and
CURTIS HOLT, SR. *et al.* and
CRUSADE FOR VOTERS OF RICHMOND, *et. al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Columbia, entered on June 6, 1974, denying Appellant's request for declaratory judgment. They submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial

question is presented. This case involves the frustration of the voting rights of the citizens of the City of Richmond since 1970 due, in substantial part, to a procedural morass involving two Federal Court proceedings and an order, April 24, 1972, by this Court enjoining the holding of such City elections, *Holt v. City of Richmond*, 406 U.S. 903.

OPINION BELOW

The opinion of the District Court for the District of Columbia is not yet reported. Copies of the judgment and opinion of the District Court, and the Findings of Fact and Conclusions of Law of the Special Master appointed by the District Court, are attached hereto as Appendices A, B, and C.

JURISDICTION

This suit was brought under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c (1970), on a request for declaratory judgment. The judgment of the District Court was entered on June 6, 1974. Notice of appeal was filed in that Court on July 15, 1974. The jurisdiction of this Court to review this decision by direct appeal is conferred by 42 U.S.C. §1973c (1970).

QUESTIONS PRESENTED

1. Whether the District Court below misapplied and misconstrued the principles enunciated in *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962, and then engrafted new requirements, not intended by Congress, onto the Voting Rights Act of 1965, by refusing to approve Appellant's request for declaratory judgment and holding that, if impermissible *purpose* is involved in an annexation, an "extra burden" rests on Appellant beyond that required to cure any prohibited *effect*.

2. Whether the District Court below erred in finding that the Voting Rights Act encompasses requirements so unique as to enable that Court to find an impermissible purpose in the annexation, in direct conflict with the decision of the Court of Appeals in *Holt v. City of Richmond*, 334 F. Supp. 228 (E.D. Va. 1971), *rev'd*, 459 F.2d 1093 (4th Cir. 1972), *cert. denied*, 408 U.S. 931 (*Holt I*), which, on the identical evidence and record, found no such purpose in a suit brought under the Fifteenth Amendment.

3. Whether the District Court below exceeded the jurisdiction granted by the Voting Rights Act in (1) asserting jurisdiction "to enforce the direct command of Section 5 by enjoining the annexation in order that councilmanic elections within Richmond's old boundaries can be immediately held", and then (2) requiring the District Court in Virginia, in the Intervenor's separate suit, to determine a remedy.

4. Whether the District Court below properly required the economic and administrative benefits of

annexation to be established in order to render a declaratory judgment that the voting changes resulting from annexation, as amended, did not have the purpose and effect of abridging the right to vote on account of race or color.

5. Whether approval of Appellant's 9-Ward Plan by the Attorney General, and his determination that the proposed change does not have a racially discriminatory purpose or effect, may be set aside or given no weight by the District Court below.

6. Whether a determination by the Court of Appeals that no violation of the Fifteenth Amendment had resulted from the annexation was *res judicata* as to the issues in a suit under Section 5 of the Voting Rights Act involving substantially the same parties.

7. Whether the decision in *Allen v. State Board of Elections*, 393 U.S. 544, requires the disapproval of an annexation which creates an incidental dilution of the black vote but which results from a legitimate and necessary governmental action, not addressed to voting or voting standards, practices or procedures.

STATUTE INVOLVED

Section 5 of the Voting Rights Act, as amended by Act of June 22, 1970, 84 Stat. 315, 42 U.S.C. §1973c (1970), is set forth in Appendix D hereto. This case also involves the application of the Fifteenth Amendment.

STATEMENT

The City of Richmond, like all cities in Virginia, is independent and not a part of the counties surrounding it. Its boundaries may be changed only by judicial decree, after an adversary proceeding against the county from which land area is sought, or by consolidation of the city and county after a majority of those voting in a referendum in each political subdivision have separately agreed thereto.

Pursuant to the provision of §15.1-1032 *et seq.*, Ch. 25, Code of Va. (1973), the City of Richmond originally instituted an annexation proceeding in 1961 against Chesterfield County. The City simultaneously filed another case against Henrico County which also adjoins the City. An award by the three-judge annexation Court in the Henrico County case was refused by the City. After various delays, the annexation case against Chesterfield County came up for trial in September, 1968. After further delay by the three judge annexation Court and after a trial lasting over six weeks, the City of Richmond established, as required by Virginia statutes, that it was necessary and expedient to annex certain territory adjoining the City located in Chesterfield County, §15.1-1041. Officials of the City of Richmond and the County of Chesterfield had entered into a compromise agreement outside of Court during the summer of 1969, which was presented to the Court for consideration. After hearing additional evidence, including that from various intervenors, a decree was entered in July, 1969, incorporating to a large extent the suggested compromise and awarding the

City approximately twenty-three square miles of land area. §15.1-1042.

The pre-annexation population of the City of Richmond as of 1970 was 202,359. Of these, 103,377 were non-white, and 98,982 white, persons. The annexation added to the City, according to the 1970 United States Census figures, 47,072 people. Of these, 1,389 were non-white, and 45,683 white, persons. The population of Chesterfield County as of 1968, prior to annexation, was 102,633 white, and 9,845 non-white, persons.

The intervenors in this annexation case moved for a stay of the annexation decree and an appeal to the Supreme Court of Virginia. *City of Richmond v. County of Chesterfield*, Circuit Court of Chesterfield County, July 1, 1969, *writ of error refused sub nom., Deerbourne Civic and Recreation Association v. City of Richmond*, 210 Va. 1i (1970), *cert. denied*, 397 U.S. 1038. Both were denied. Intervenors then petitioned for a writ of certiorari and stay to this Court, but both were denied. 397 U.S. 1038. The intervenors in this case, Crusade for Voters and Curtis Holt, Sr., were not intervenors in the annexation suit, and intervened herein over the objection of Appellant.

On January 1, 1970, the City took jurisdiction over the area awarded to it from Chesterfield County and has continued to operate, manage and supervise the area since that date. An election was conducted for City Councilmen in the newly enlarged City in May, 1970. This election was conducted on an at-large basis as provided by City Charter since 1948. At that time incidental voting changes resulting from annexation had

not been construed to come under the Voting Rights Act of 1965.[1]

Approximately one year after the annexation decree became effective, on January 28, 1971, two weeks after the decision in *Perkins v. Matthews*, 400 U.S. 379, the City submitted the voting change resulting from the annexation decree by letter from the City Attorney to the Attorney General of the United States in accordance with the alternative provisions of Section 5 of the Act. The Attorney General interposed an objection by letter to the City Attorney dated May 7, 1971. The Attorney General was asked to reconsider his objections by letter dated August 2, 1971, after the decision in *Whitcomb v. Chavis*, 403 U.S. 124, since the Attorney General in his previous letter had relied on that case before it was reversed by this Court. By letter dated September 30, 1971, the Attorney General again

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[1] The Opinion below states, App. B, p. 14, that the election of 1970 was concededly illegal. This is not the case. The City of Richmond has never conceded that the voting consequences of annexation were covered under the Voting Rights Act, until the decision in *Perkins v. Matthews*, 400 U.S. 379. Further, the District Court states, App. B, p. 15, that it was only after *Perkins* and after the Attorney General had informed Richmond that it was in violation, that the City made its "belated attempts" to comply with the Act. This is erroneous, and is a gross mischaracterization of the evidence on the record. Immediately after *Perkins*, Appellant submitted its request to the Attorney General, who never informed Appellant of anything at all, *except in response to Appellant's requests*, which were made pursuant to its efforts to comply with Section 5. In short, Appellant was not prompted to action by the Attorney General, and there is no evidence in the record to support the statement of the District Court.

advised the City Attorney that he still declined to lift his objection.

Approximately one month after the original submission for approval to the Attorney General, on February 24, 1971, a class action was instituted in the United States District Court for the Eastern District of Virginia in the name of Curtis Holt, Sr. It alleged primarily that the voting rights of the plaintiff class guaranteed by the Fifteenth Amendment had been violated by the change resulting from the annexation. The District Court, on November 23, 1971, ruled that the voting rights guaranteed by the Fifteenth Amendment had been violated, and ordered a new election of City Councilmen. Seven were to be elected at large by the former City residents, and two elected at large, primarily from the newly annexed area. This election order was stayed on December 8, 1971, by the United States Court of Appeals for the Fourth Circuit. On appeal, by both the City and Holt, this Court of Appeals ruled that no wrongful purpose, but rather valid reasons, existed for the annexation and that the Fifteenth Amendment had not been violated, thus reversing the lower Court's decision. A Writ of Certiorari was denied by this Court. *Holt v. City of Richmond,* 334 F. Supp. 228 (E.D. Va. 1971), *rev'd,* 459 F.2d 1093 (4th Cir. 1972), *cert. denied,* 408 U.S. 931 (*Holt I*).

Based on the decision by the Fourth Circuit Court of Appeals, the City Attorney by letter dated July 5, 1972, again asked the United States Attorney General to reconsider his objection on the grounds that the Voting Rights Act of 1965 only codifies rights

guaranteed by the Fifteenth Amendment. Due to pending litigation, the Attorney General declined to reconsider his administrative objection. As explained hereafter, he subsequently has approved Appellant's plan for elections of City councilmen on a ward basis, as being in compliance with the Voting Rights Act. This is exactly the same plan which the District Court below rejected.

On December 9, 1971, Curtis Holt, Sr. instituted another suit in the United States District Court for the Eastern District of Virginia (*Holt II*) (Case No. C.A. 695-71-R). He alleged, *inter alia,* that the City had not complied with Section 5 of the Voting Rights Act of 1965, and that, accordingly, the annexation of territory from Chesterfield County was invalid. A three-judge Court was convened pursuant to 28 U.S.C. §2284 (1970). The plaintiff in that action subsequently sought an injunction against the election officials of the City of Richmond, to restrain them from holding the election of City Council members, scheduled under Virginia law for the first Tuesday in May, 1972. The three-judge Court refused to enjoin the election. Upon application to the Chief Justice of the United States, the election was stayed on April 24, 1972, until further order. 406 U.S. 903. A subsequent Order was entered by the three-judge Court on October 12, 1972, which enjoined any elections of City officials.

Since the Attorney General declined to reconsider his objection, the City filed this suit in the District Court for the District of Columbia pursuant to Section 5 of the Act, seeking approval of the voting changes resulting from the annexation, and relying upon *Holt I*

as dispositive of the issues. Since Richmond's City Council was elected at large, *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962, decided after the institution of this suit, appeared to be similar to this case, as was observed by the Chief Judge of the Court below at a pre-trial conference. Therefore, although believing *Holt I* fully had settled the issue, the City decided to file an Amended Complaint seeking approval of the voting changes in the context of a ward system for electing councilmen.

After public hearings, a proposed ward plan was adopted by the City Council of the City of Richmond and presented to the Attorney General. The Department of Justice, after consultations, suggested some modifications which were approved by the City Council. The ward plan thus evolved was then jointly submitted to the District Court by Appellant and the Attorney General.

The wards were established to meet traditional legal standards as well as the one-man-one-vote requirements. They also reflected a majority of white voting age population in four wards, and a majority of black voting age population in four wards, with the ninth ward having a substantial number of both white and black voting age population, with a white majority.

The black voting age population of Richmond was 44.8 percent before the annexation and 37.3 percent after annexation. The ward plan submitted to the District Court below by the City and the United States Attorney General reflected accurately, to the greatest extent reasonably possible, the black-white ratio of

voting age population, as it existed before annexation.

The District Court below referred the case to a Special Master for a hearing. After the hearing the Master recommended de-annexation to that District Court. The latter Court refrained from ordering de-annexation, but the majority believed it had the power to do so if it chose. (App. B, p. 32). The District Court also refused to grant the declaratory judgment sought by Appellant, holding that the ward plan submitted by the City and the United States did not, to the extent possible, minimize dilution of the black vote (*Id.*, p. 23). The Court below, in effect, held that the City must "over-compensate" the black vote by having more wards with predominantly black voters than the total black voting age population of the City would warrant.

The District Court below held that no economic or financial benefits for the City could be ascribed to the annexation (App. B, pp. 20-21). Appellant and the Attorney General interpret the Voting Rights Act of 1965 as being concerned only with voting changes and not economic considerations. In addition, the necessity and expediency of annexation had been established in the state annexation Court and in *Holt I*, both of which records were part of the record in this case. The earlier proved financial benefits of annexation were reinforced by a report published by the Urban Institute and tendered to the Court, but not accepted as evidence.[2]

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[2] "The Impact of Annexation on City Finances: A Case Study in Richmond, Virginia." Thomas Muller and Grace Dawson, The Urban Institute, May, 1973. The Urban Institute is a non-profit, independent, research corporation. The case study was done with the financial support of the Ford Foundation.

That Court gave no legal basis for linking its economic and administrative findings with the voting rights protected by the Act.

The District Court below took no affirmative action as to remedy. In refusing to grant Appellant's declaratory judgment, that Court suggested to Intervenor Holt that he seek a remedy in his other case pending before a three-judge Court of the United States District Court for the Eastern District of Virginia. (App. B, p. 32). Appellant's motion to vacate and stay the order of the District Court, in order to preserve the time for appeal while proceeding in the Virginia District Court, was denied July 9, 1974, by the District Court below.

THE QUESTIONS ARE SUBSTANTIAL

Appellant, City of Richmond, has not been able to hold a councilmanic election since 1970, having been enjoined from holding said elections pending the resolution of this suit. Although councilmanic elections are required every two years by charter, all of the citizens of Richmond thus have been deprived of their right to vote in local elections. The decision of the District Court below places Appellant in a procedural morass in its efforts to comply with the Voting Rights Act of 1965. No election is possible in the foreseeable future. That Court's interpretation of the Act and of the decision in *City of Petersburg v. United States, supra,* have placed Appellant in the position of having no reasonable means of remedying any dilution in black

voting strength which may have been caused by the annexation. The citizens of Richmond, black and white, and the present Council, are thus in a "twilight zone" insofar as representative government is concerned. The legal consequences of the voting changes effected by the annexation, and Appellant's efforts to remedy any prohibited effect, are enmeshed in two lawsuits in two United States District Courts, in two different Districts, although two additional suits on the same issues have been concluded.

Determination of the issues involved is vital to the future for any city which may find itself in the position of Appellant. For the City of Richmond, the right of voter participation in the governmental process has been frustrated and is at stake.

1. The District Court Impermissibly Has Misconstrued and Rewritten Section 5 of the Voting Rights Act.

After this Court's affirmance of *Petersburg,* Appellant, in consultation with the Department of Justice, adopted a 9-Ward Plan, approved by the Attorney General, "calculated to neutralize to the extent possible any adverse affect upon the political participation of black voters." As a result of annexation, the black voting age population was reduced from 44.8% of the total to 37.3%. Voting age population is the limit on the number of citizens who can register and vote. It is the necessary measure of voting strength. *Zimmer v. McKeithen,* 467 F.2d 1381, 1384-1385 (5th Cir. 1972); *Moore v. Leflore County,* 361 F. Supp. 603, 607 (N.D. Miss. 1972).

The 44.8% of the voting population represented 4.03 seats on the nine member council prior to annexation. However, with the at-large voting procedure which prevailed, no seats were assured; if there were polarization by race, not one representative could have been elected by black voters. The 9-Ward Plan assures four seats to black voters, with a chance at five, which chance will increase in the future as black voting population increases. Even though no race has a constitutional right to elect one of their race, *Cherry v. New Hanover*, 489 F.2d 273, 274 (4th Cir. 1973)[3], four seats are here assured. This places the black voting population in a stronger position than prior to annexation. Appellant contends, joined by the United States, that the dilution of black voting strength is thus eliminated. The District Court, ignoring the realities of voting age population ratios, refused to accept the position of Appellant and the United States. It also ignored the fact that "legislators represent people not percentages of people." *Graves v. Barnes*, 343 F. Supp. 704, 713, fn. 5 (W.D. Tex. 1972), *aff'd and rev'd in part, sub nom., White v. Regester*, 412 U.S. 755.

In fact, de-annexation, suggested by the District Court below, would be retrogressive. It would return

[3]See *Cousins v. City Council of City of Chicago*, 466 F.2d 830, 843 (7th Cir. 1972), *cert. denied*, 409 U.S. 893:

> "... [T]here is no principle which requires a minority racial or ethnic group to have any particular voting strength reflected in the [city] council. The principle is that such strength must not be purposely minimized on account of their race or ethnic origin."

the City to its pre-annexation posture: at-large voting, with the black voting age population 44.8% of the total. Under this scheme, any bloc voting, by race, would foreclose any assurance that black voters could elect one representative. By refusing to consider voting age population, the District Court thus reached this anomalous conclusion.

The District Court attempted to distinguish the instant case from *Petersburg* by holding that the lack of discriminatory purpose in the annexation plan in *Petersburg* was a basis of that decision. *Petersburg*, however, held that, notwithstanding an absence of impermissible purpose, a diluting effect constituted a violation of the Act. 354 F. Supp. at 1027-1028. The District Court below concluded that, unlike *Petersburg*, when impermissible purpose is involved, "an extra burden rests on that city to purge itself of discriminatory taint as well as to show that the annexation will not have the prohibited effect." (App. B, p. 20).

The District Court below held that, to convince it that Appellant had "purged" itself of a discriminatory purpose, it must show (1) that the ward plan not only reduced, but effectively eliminated, the dilution of black voting strength and (2) that the City has some objectively verifiable legitimate purpose for annexation. (App. B, p. 20). Appellant contends that such dilution, as shown, has been effectively eliminated. Thus, the "extra burden" in fact necessitates more than elimination of dilution to the maximum extent reasonably possible, the *Petersburg* standard, and, indeed, more than effective elimination of dilution. Appellant is without guidance as to how far beyond effective

elimination, *i.e.*, four black seats, it must go to meet such an extra burden. If to do this requires an "over compensation" in order to insure more black seats on the council, the "to the extent possible" criterion from the *Petersburg* standard is effectively erased.[4]

Nowhere in the Act or in the cases interpreting that Act does such a requirement, *i.e.*, an extra burden because of impermissible purpose, appear. In reading it into the Act, the District Court below has, in spite of its protestation to the contrary, adopted the Master's contention that an impermissible purpose can never be cured.

Nowhere in the Act, or in the legislative history, is it even suggested that two distinct violations as to "purpose" and "effect" could occur or that these terms are anything other than means to the same end. If a change in voting practice has an impermissible effect, it is also prohibited. There is no indication that a different burden or sanction is required for showing absence of either purpose or effect. In every case the remedy is the same – a fairly drawn redistricting which meets constitutional requirements. *City of Petersburg v. United States, supra,* 354 F. Supp. at 1030-1031.

The District Court has rewritten the Act, as well as the decision in *Petersburg*. Further, because of its finding of impermissible purpose, it has left Appellant with an "extra burden", no standards or notions on

[4] " . . . [T]his annexation can be approved only on the condition that modifications calculated to neutralize *to the extent possible* any adverse affect upon the political participation of black voters are adopted, i.e., that the plaintiff [city] shift from an at-large to a ward system of electing its city councilmen." 354 F. Supp. at 1031 (emphasis added).

how to meet that burden, and with de-annexation put forward as the only remaining issue.

2. The District Court Found an Impermissible Annexation Purpose on the Same Record Upon Which the Fourth Circuit Court of Appeals Previously Had Reached an Opposite Conclusion.

The incidental and unintended effect of the City of Richmond's annexation of Chesterfield County, the dilution of black voting strength, is conceded here. *City of Petersburg v. United States, supra,* disposed of the notion that impermissible effects of an annexation could not be cured, thereby locking the city into its original boundaries, by holding that such was not the intent of Congress in enacting the Voting Rights Act. 354 F. Supp. at 1030.

The District Court below found an impermissible purpose in the annexation, in direct conflict with the decision of the Court of Appeals in *Holt I*. In doing so, that District Court made substantially the same findings, based on the same evidence, as were made by the District Court in *Holt I*. The findings of the District Court in *Holt I* were reversed by the Court of Appeals which held, on the same evidence upon which the Court in this case made its findings, that no impermissible purpose existed. In refusing to follow the determination of the Court of Appeals in *Holt I*, the District Court in this case, in effect, held that Section 5 requires a different standard and a different interpretation of the same evidence than does the Fifteenth Amendment.

The identical record and evidence, from *Holt I*, were before the District Court in this case. The determination of the *Holt I* Court was held by the District Court below in this Section 5 case, however, not to be binding upon it, despite the identical subject matter and similarity of the parties. On the identical record and evidence in *Holt I*, the District Court below found that impermissible purpose did exist (App. B, p. 16, fn. 43), whereas the Fourth Circuit Court of Appeals reached the opposite conclusion in the Fifteenth Amendment case, after a full hearing on the merits before the Virginia District Court. In this case, however, the only hearing on the merits, before the Special Master – not the Court itself – related to the appropriate ward plan to eliminate dilution of the black vote. Evidence as to the purpose of the annexation was stipulated from the *Holt I* record.

The Court cannot reach a conclusion as to the significance of the same evidence in a Section 5 case different from its significance in a Fifteenth Amendment case. They are one and the same. *South Carolina v. Katzenbach*, 383 U.S. 301, 326-327.

3. The District Court Improperly Claimed Authority to Effect De-Annexation and Referred That Remedy to a Virginia District Court in Another Suit.

The District Court below disagreed with the contention of Appellant and the United States that the Court did not have jurisdiction to order de-annexation. That Court held (Judge Jones dissenting) that it did

have jurisdiction to enjoin the annexation and order elections within the "old" city. The Court, however, refrained from so ordering. (App. B, pp. 36-38).

Instead, the District Court below, noting the pendancy of *Holt II* in the Virginia Federal District Court, stated that the latter Court could "better balance all relevant factors, including our refusal to grant Richmond a declaratory judgment, in deciding whether to order de-annexation." Appellee Holt (Intervenor below) therefore was left to "repair to the District Court in Virginia and obtain not only fair, but also more fully informed, consideration of his request for de-annexation." (App. B. p. 37).

Initially, the District Court below exceeded its jurisdiction in asserting power to order de-annexation. The jurisdiction of the District Court in the District of Columbia to hear and determine requests for declaratory judgments under Section 5 is limited by that section, which confers jurisdiction on that Court. Pursuant to the Act, the authority of that Court extends only to the declaration of whether the voting changes occasioned by the annexation, as amended by the 9-Ward Plan, have or do not have the purpose and effect of denying or abridging the right to vote on account of race or color. This principle was recognized in *Beer v. United States*, 374 F. Supp. 357, 361-362 (D.D.C. 1974). In this case, the proper issue under the Act was not what Richmond's boundaries should be, but whether the annexation, as modified by the 9-Ward Plan of election, had a proscribed purpose or effect. The District Court below, however, did "not assent to any language in the *Beer I* opinion" which suggested that jurisdiction was so limited. (App. B, p. 33).

The District Court below attempted to follow this Court's action in *Perkins v. Matthews*, 400 U.S. 379, 397, by remanding the case to a local Court for appropriate remedy. This Court may remand to a lower Court with instructions to formulate a remedy. The District Court for the District of Columbia cannot, on the authority of *Perkins*, pass its claimed jurisdiction to another three-judge District Court in Virginia. Thus, it is now left to the Virginia Court, in a suit brought by an intervenor, to decide upon the intervenor's request for de-annexation (App. B, p. 37).

4. The District Court Improperly Required Richmond to Establish Economic and Administrative Benefits for the Annexation.

The District Court below stated that, in meeting the extra burden placed upon it, Appellant must show that it had some objectively verifiable legitimate purpose for the annexation (App. B, p. 20). That Court adopted the Master's conclusions that Appellant "failed to establish any counter-balancing economic or administrative benefits of the annexation." The findings of the Master, adopted by the Court, relate to the economics of de-annexation and the comparative financial benefits of administering the annexed area.

Appellant and the United States contended, and still contend, that such findings, and the underlying evidence, are irrelevant to the issue before the District Court – whether the voting changes caused by annexation, amended by the 9-Ward Plan, resulted in an impermissible dilution of the black voting strength in

the city. This is a question of constitutional rights, upon which economic issues have no bearing. *Watson v. Memphis*, 373 U.S. 526, 537-538.

Appellant is not required by the Act to justify the annexation *per se*. The proper forum for that issue was the duly constituted Virginia annexation Court which ordered the annexation. If there were no legitimate purpose for the annexation, there would have been none. The annexation was accomplished by a three judge annexation Court acting pursuant to the laws of Virginia. The record of that proceeding, a part of the *Holt I* record, establishes beyond question the legitimate economic, governmental and administrative benefits of annexation. Further, the District Court in *Holt I* quoted the state Court to the effect that " 'The evidence overwhelmingly convinces us of the necessity for and the expediency of some annexation.' " 334 F. Supp. at 234, fn. 3.

These economic and administrative benefits of annexation have now been established before three different Courts. Indeed, this Court may take judicial notice of the necessity for expansion confronting our nation's cities today. In Virginia, this expansion can only be accomplished by a special annexation Court, as was done here.

The question before the District Court below, however, was not whether the annexation was a good one, or a bad one, for the City of Richmond. The question related to the changes in voting practices occasioned by the annexation, together with the 9-Ward voting plan. As stated by the Attorney General in the District Court below, a "good" annexation cannot make an impermissible change valid; a "bad" annexation

cannot make a permissible change, which eliminates any dilution in black voting strength, invalid.

Further, the Attorney General is given status, equal to that of the Courts, to pass upon voting changes under Section 5. Any such requirement that the economic and administrative aspects of annexations must be considered by him will place an insurmountable burden upon the Department of Justice. The Attorney General, through the Voting Rights Section of the Department of Justice, is an expert, indeed the *only* expert, in the area of voting rights. If, in order to fulfill the statutory duties under Section 5, the Attorney General must become an expert in annexations, and the economic, governmental and administrative aspects thereof, the jurisdiction of the Executive Branch will be vastly expanded.

Evidence of the economic aspects of annexation cannot be a basis of decision under Section 5. This has been the position of the Attorney General since the adoption of the Act. His interpretation of Section 5 is "entitled to deference". *City of Petersburg v. United States*, 354 F. Supp. 1021, 1031 (D.D.C. 1972), *aff'd*, 410 U.S. 962; *Perkins v. Matthews*, 400 U.S. 379, 390-391.

5. The District Court Improperly Ignored the Attorney General's Approval of Richmond's 9-Ward Plan.

In this case, after Appellant sought approval of its at-large voting system, the *Petersburg* case was affirmed by this Court. Appellant then, pursuant to that

decision, adopted its proposed 9-Ward Plan, after consultation with and suggestions from the Department of Justice. The Attorney General has approved the proposed plan, and supported the plan in the District Court as having no racial purpose or effect. The Act gives the Attorney General equal responsibility for an initial decision upon voting changes. In exercising that responsibility, he will refrain from objecting to a voting change only if he is satisfied that "the proposed change does not have a racially discriminatory purpose or effect." *Georgia v. United States*, 411 U.S. 526, 537.

The District Court below gave no weight to the Attorney General's interpretation, and, indeed, simply ignored it. The Attorney General, however, as noted above, is the only "expert" recognized by the Act.

6. *Holt I* Should Be Given Res Judicata and Collateral Estoppel Effect in This Case.

In *Holt I*, an action brought by Appellee Holt herein under the Fifteenth Amendment, the Court of Appeals held: "Under the circumstances, no violation of any Fifteenth Amendment right was worked by the annexation, effected, as it was, by the decree of the state court." *Holt v. City of Richmond*, 459 F.2d 1093, 1100 (4th Cir. 1972), *cert. denied*, 408 U.S. 931. This holding has been reversed by the District Court below.

The provisions of the Voting Rights Act only codify rights guaranteed by the Fifteenth Amendment. *South Carolina v. Katzenbach*, 383 U.S. 301, 326-327. The issues in the instant case were, therefore, subsumed in

the central issue in *Holt I* – whether *any* Fifteenth Amendment rights were violated.

The decision in *Holt I* should be given *res judicata* and collateral estoppel effect in the instant case. The class of citizens represented by Appellee Crusade is the same class represented by Holt, who was found in *Holt I* to be a proper representative of his class. The issues have already been determined. The policy of finality of judgments demands that these issues be held to have been determined once and for all.

As former Chief Justice Warren stated regarding *res judicata* and collateral estoppel:

> "...[U]nder the doctrine of *res judicata*, a judgment 'on the merits' in a proper suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit...." *Lawler v. National Screen Service Corp.*, 349 U.S. 322, 326. *See also, Hoag v. New Jersey*, 356 U.S. 464, 470-471.

7. Given *Allen v. State Board of Elections*, Incidental Voting Changes Resulting From a Legitimate Annexation Do Not Violate Section 5 of the Voting Rights Act.

Any annexation by Appellant of surrounding territory would, in fact, dilute the black vote in the City. This was recognized by the Court in the initial proceeding in *Holt I*, 334 F. Supp. at 234. An increase

of voters resulting from a legitimate annexation cannot be considered "substantive discrimination". *Allen v. State Board of Elections*, 393 U.S. 544, 559. Unless the racial composition of the annexed area approximates that of the City, annexation inevitably will reduce the voting potential of one of the races.

However, the governing principle is that, where such dilution is an inevitable, incidential consequence of legislative or judicial action not addressed to voting, and is supported by substantial, legitimate governmental considerations, the dilution is not an effect of a changed voting procedure. It is, rather, a product of other, legitimate governmental action.

Perkins v. Matthews, 400 U.S. 379, 389, held that Section 5 was designed to cover changes having a "potential for racial discrimination in voting." This is a plain holding that such changes are covered. It does not answer the substantive question of whether the change was for the purpose of abridging the right to vote. If it did so imply, virtually every change in city land areas by annexation would be discouraged, if not effectively inhibited. It is difficult to conceive of any system, standard, practice or procedure which could not be thus challenged as discriminatory.

Whether the substantive question arises under Section 5 or the Fifteenth Amendment, it is the same–whether the purpose and effect of the change is to deny or dilute voting rights on the basis of race or color. In the instant case, the effect upon black voting strength was incidental to achieving different, legitimate governmental goals attainable only through annexation. Such an expansion should not be unlawful, whether it brings in more whites or more blacks.

While the "change" may be "covered" by Section 5, if *Allen* and *Perkins* are construed so as to prohibit this annexation, then every change must be so prohibited. *Allen* and *Perkins* should not be so applied.

CONCLUSION

The District Court below erred in its construction and application of Section 5 of the Voting Rights Act. By leaving the possibility of holding elections to a three-judge United States District Court in Virginia, with the issue there being that of de-annexation (as requested by an intervenor in the instant case), the entire purpose of that Act also has been subverted.

As the District Court stated in *Graves v. Barnes, supra:*

> " . . . In ten years of wandering about this political thicket, we have not yet found the burning bush of final explanation . . . . We realize that there is no perfect electoral process, for democracy is at best a search for 'proximate solutions' to insoluble problems . . . . " 343 F. Supp. at 708.

This Court alone must decide the issues presented by this case. These questions should be decided now, without further enmeshing the Appellant in a pro-

cedural morass, which can only further prolong the postponement of elections by the Citizens of Richmond. Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF RICHMOND, VIRGINIA,
Plaintiff

v.

UNITED STATES OF AMERICA and
RICHARD KLEINDIENST,
Defendants

and

CURTIS HOLT, SR. *et al.*

and

CRUSADE FOR VOTERS OF RICHMOND *et al.*,
Defendant-Intervenors

JUDGMENT

This cause came on for hearing on the pleadings, the record made before the Master, the findings of the Master, and the record made before this court. After considering the briefs and the argument of counsel, and for the reasons stated in the opinion filed herein on May 29, 1974, it is

ORDERED by the court that the plaintiff's application for a declaratory judgment be, and it is hereby, denied.

/s/J. Skelly Wright
J. SKELLY WRIGHT
UNITED STATES CIRCUIT JUDGE

/s/William B. Jones
WILLIAM B. JONES
UNITED STATES DISTRICT JUDGE

/s/June L. Green
JUNE L. GREEN
UNITED STATES DISTRICT JUDGE

Washington, D. C.

June 5, 1974

FILED

JUN 6 1974

JAMES F. DAVEY, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF RICHMOND, VIRGINIA, Plaintiff	)	
v.	)	Civil Action No. 1718-72
UNITED STATES OF AMERICA and RICHARD KLEINDIENST, Defendants	)	
CURTIS HOLT, SR. *et al.* and CRUSADE FOR VOTERS OF RICHMOND *et al.*,	)	
Defendant Intervenors	)	(Filed, May 29, 1974 –James F. Davey, Clerk)

Charles S. Rhyne and David M. Dixon, Washington, D.C., and Daniel T. Balfour, Richmond, Virginia, for plaintiff.

Gerald W. Jones and Sidney R. Bixler, Attorneys, Department of Justice, for defendants.

W.H.C. Venable and John M. McCarthy, Richmond, Virginia, for defendant intervenors Curtis Holt, Sr. *et al.*

James P. Parker and Armand Derfner, Washington, D.C., for defendant intervenors Crusade for Voters of Richmond *et al.*

Before WRIGHT, Circuit Judge, and JONES and GREEN, District Judges.

WRIGHT, Circuit Judge: The City of Richmond, Virginia instituted this action seeking a declaratory judgment, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c (1970), that its annexation of approximately 23 square miles of adjacent county land does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.[1] Richmond

[1] Section 5, 42 U.S.C. §1973c (1970), provides:

§1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court.

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard,

subsequently adopted a change in its method of electing its City Council from its previous at-large system to a nine-ward, single-member district plan. The City now requests that we approve under Section 5 the annexation as modified by this ward plan. Under rule 53(c) of the Federal Rules of Civil Procedure, we referred the case to a Master to hold a hearing and to take testimony on "whether the City of Richmond annexation plan as amended has the purpose or the effect of diluting the black vote in that City." The Master found that the City had failed to carry the burden imposed on it by Section 5 of proving that the annexation, even as modified, did not have such a discriminatory purpose or effect. We conclude that this finding, far from being "clearly erroneous,"[2] was compelled by the record before the Master. We therefore decline to grant Richmond the declaratory judgment it seeks.

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practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

[2] Rule 53(e)(2), *Fed. R. Civ. P.*, states: "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."

I

Before discussing the Master's findings and the record in this case, we think it appropriate to delineate and stress the heavy responsibility placed on this court by Section 5 of the Voting Rights Act of 1965. The origin and meaning of Section 5 were eloquently and thoroughly set forth by Judge Robinson in *Beer v. United States*, *D. D.C.*, ___ F.Supp. ___ (Civil Action No. 1495-73, March 15, 1974). Judge Robinson's exposition, as well as several previous opinions of the Supreme Court,[3] make clear that our responsibility is no less than to ensure realization of the Fifteenth Amendment's promise of equal participation in our electoral process.[4] Although we need not retrace all of Judge Robinson's comprehensive analysis of the historical evolution of Section 5, in order to gain a full appreciation of our responsibility it is necessary to consider briefly the section's significance, especially as relevant to the expansion of urban boundaries in those states covered by the section.

In language tracked by Section 5, Section 1 of the Fifteenth Amendment proclaims that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Since the post-Civil War enactment of the amendment, this language has been invoked to

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[3] *Georgia v. United States*, 411 U.S. 526 (1973); *Perkins v. Matthews*, 400 U.S. 379 (1971); *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

[4] *See Allen v. State Board of Elections*, *supra* note 3, 393 U.S. at 556.

invalidate a host of devices and procedures designed by certain Southern states to deny the franchise to our nations's black citizens.[5] However, state legislatures desirous of abridging the voting rights of blacks proved themselves resilient and ingenious in erecting new obstructions to black voting. In 1957 Congress, employing the power vested in it by Section 2 of the Fifteenth Amendment "to enforce this [amendment] by appropriate legislation," authorized the Attorney General to seek injunctions against interference with the right to vote on racial grounds.[6] But the persistent state legislatures seemed able to avert even this power by delaying litigation and by turning to discriminatory devices not covered by the injunctions obtained.[7] Though Congress made further efforts in 1960 and 1964 to make accessible the electoral process to all Americans regardless of race, the impact on black voter registration was still not substantial.[8] In 1965 Congress acted again, this time with a "firm intention to rid the country of racial discrimination in voting" by "a complex scheme of stringent remedies."[9]

Section 5 of the 1965 Act, working in tandem with Section 4, is a central part of that scheme. Section 4

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[5]*See South Carolina v. Katzenbach, supra* note 3, 383 U.S. at 311-312.

[6]Pub. L. 85-315, § 131(b) & (c), 42 U.S.C. § 1971(a) & (c) (1970).

[7]*See South Carolina v. Katzenbach, supra* note 3, 383 U.S. at 313-314.

[8]*See* H.R. Rep. No. 439, 89th Cong., 1st Sess., 9-11 (1965).

[9]*South Carolina v. Katzenbach, supra* note 3, 383 U.S. at 315.

suspended use of any test or device[10] in determining eligibility to vote in states which were using a test or device in 1964 and where voter participation was below a minimum 50 per cent level in that year.[11] Section 5 protects the effectiveness of Section 4. To ensure that the covered states would not resort to the "stratagem of contriving new rules"[12] to evade efforts to secure blacks their rights to equal participation in the electoral process, this section effectively "freezes the election laws"[13] of states covered by Section 4. Before one of these states can administer any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," it must obtain the approval of the Attorney General or a declaratory

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[10]The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

42 U.S.C. §1973b(c) (1970).

[11]The suspension covered a minimum period of five years as the Act was originally enacted in 1965. Pub. L. 89-110, Title 1, §4, 79 *Stat.* 438. However, a 1970 amendment extended the suspension period to 10 years. Pub. L. 91-284, §3, 42 U.S.C. §1973b(a). Section 4 was also amended to cover states or subdivisions of states which in 1968 employed a test or device and where voter participation was below 50% in that year. Pub. L. 91-285, § 4, 42 U.S.C. § 1973b(b).

[12]*South Carolina v. Katzenbach, supra* note 3, 383 U.S. at 335.

[13]*Georgia v. United States, supra* note 3, 411 U.S. at 538.

judgment from a three-judge District Court for the District of Columgia [sic] that the new practice or procedure (1) does not have the purpose and (2) will not have the effect of denying or abridging the right to vote on account of race or color.[14] As the Supreme Court has repeatedly made clear, Congress thus shifted the burden of proof in voting rights litigation on to the states,[15] requiring them to prove both the absence of a discriminatory purpose and the absence of a discriminatory effect before instituting new procedures which have any potential for abridging or denying voting rights of blacks.[16]

In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the Supreme Court determined that the "Voting Rights Act was aimed at the subtle, as well as the obvious," state schemes for denying voting rights and that Congress thus intended that the Act be given its "broadest possible scope."[17] In its next decision

[14]*See* note 1 *supra*.

[15]*Georgia v. United States*, *supra* note 3, 411 U.S. at 538: "It is well established that in a declaratory judgment action under §5, the plaintiff State has the burden of proof." *See also South Carolina v. Katzenbach*, *supra* note 3, 383 U.S. at 335; *City of Petersburg, Va. v. United States*, D. D.C., 354 F.Supp. 1021, 1027-1028 (1972), *affirmed*, 410 U.S. 962 (1973).

[16]The Supreme Court has characterized §5 as "an unusual, and in some aspects a severe, procedure for insuring that States would not discriminate on the basis of race in the enforcement of their voting laws." *Allen v. State Board of Elections*, *supra* note 3, 393 U.S. at 556. The Court did not hesitate, however, to uphold the section's constitutionality. *South Carolina v. Katzenbach*, *supra* note 3, 383 U.S. at 334-335.

[17]393 U.S. at 565, 567.

involving Section 5, *Perkins v. Matthews*, 400 U.S. 379 (1971), the Court held that a change in a city's boundary lines "which enlarge[s] the city's number of eligible voters also constitutes the change of a 'standard, practice, or procedure with respect to voting,'" and thus is covered by Section 5.[18] The *Perkins* Court reasoned that when a city expands its boundaries and adds new citizens to its voting rolls the votes of its old citizens are inevitably diluted. Quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), it stressed that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[19] *Perkins* left implicit the obvious: If the proportion of blacks in the new citizenry from the annexed area is appreciably less than the proportion of blacks living within the city's old boundaries, and particularly if there is a history of racial bloc voting in the city, the voting power of black citizens as a class is diluted and thus abridged.[20]

[18]400 U.S. at 388.

[19]*Id. Perkins* also emphasized that the *Allen* Court had decided that the dilution of black voting power which could follow upon a change from a single-member district to an at-large election of county officials required that such a change be subjected to §5 scrutiny. *Id.* at 390. "The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Allen v. State Board of Elections*, *supra* note 3, 393 U.S. at 569.

[20]This meaning of *Perkins* was assumed in *City of Petersburg, Va. v. United States*, *supra* note 15, 354 F.Supp. at 1024-1025.

In August 1965 it was determined that Virginia was one of the states covered by Section 4 and thus by Section 5.[21] It is therefore our responsibility under Section 5 to deny approval to Richmond's annexation of new voters unless Richmond can carry the burden of proving that the annexation, as modified by the ward plan, (1) does not have the purpose of abridging black voting power and (2) will not have such an effect. "This is a heavy burden for a community in a state with Virginia's history of past racial discrimination." *City of Petersburg, Va. v. United States*, D. D.C., 354 F. Supp. 1021, 1027 (1972), *affirmed*, 410 U.S. 962 (1973).

II

With Richmond's burden of proof in mind, we turn to an examination of the Master's report and the facts of this case. The parties stipulated to the record in *Holt v. City of Richmond*, E.D. Va., 334 F.Supp. 228 (1971), *reversed*, 4 Cir., 459 F.2d 1093, *cert. denied*, 408 U.S. 931 (1972), a previous Fifteenth Amendment suit brought against the annexation,[22] and the Master based his findings on this record as well as on the three days of testimony before him. Most of the primary findings of fact from which the Master derived his ultimate finding that Richmond had failed to carry its burden of proving the annexation, as amended, was without discriminatory purpose and effect were not

[21] 30 FED. REG. 9897 (1965).

[22] *See* note 43 *infra*.

challenged by any of the parties.[23] We are thus able to set forth most of the history of the annexation for which Richmond seeks approval without direct reference to the record.

This history began in 1962 when the City filed an annexation suit against contiguous Chesterfield County seeking to obtain 51 square miles of territory.[24] This suit lay dormant for several years, during which time Richmond unsuccessfully attempted to annex land from another adjacent county.[25] It was settled in 1969 by compromise resulting in the annexation in suit of approximately 23 of the originally sought 51 square miles.[26] The period of the suit's dormancy witnessed a significant growth in black voting strength in Richmond. Blacks were rapidly becoming a majority of the population, and "[w]hile in 1968 there were more whites than Negroes registered to vote, about 50% of the registered Negroes voted as against approximately 30% of the white registered voters."[27] Racial bloc voting was evident and a black civic organization–intervenor Crusade for Voters–had gained substantial electoral power, rivaling its white counterpart–Richmond Forward. In the 1968 at-large City Council

[23] Intervenors Curtis Holt, Sr. and Crusade for Voters were allowed to participate in this action as representatives of the black community.

[24] Master's Findings of Facts, No. 2.

[25] *Holt v. City of Richmond*, E.D. Va., 334 F.Supp. 228, 231 (1971).

[26] Master's Findings of Facts, No. 3.

[27] *Holt v. City of Richmond, supra* note 25, 334 F.Supp. at 232.

elections, Crusade-endorsed candidates won three of the nine Council seats from Richmond Forward endorsees.[28] The Master's findings indicate that these developments caused the Richmond white political leadership great concern that the black voting bloc would be able to elect a majority to the City Council in the 1970 elections. The Richmond mayor, white incumbent city councilmen, the city attorney, and other representatives of the City and its white political leadership expressed their sentiments to Chesterfield County officials, to a state commission studying Richmond's expansion, and to residents of the City. These expressions reflected a conviction that annexation of part of Chesterfield County was necessary to keep the black population from gaining control of the city in the 1970 elections.[29]

[28]Defendants' Exhibit 8.

[29]The Master set forth in his unchallenged Finding of Fact No. 6:

> 6. During the course of the annexation proceedings and thereafter, various City officials made statements on the annexation as follows:
>
> (a) About 1966, at Farmville, Virginia, City Councilman James Wheat stated that the City of Richmond needed 44,000 leadership-type white affluent people.
>
> * * * *
>
> (b) Between July 16, 1968 and September 12, 1968, Alan F. Kiepper, Richmond City Manager, and Melvin W. Burnett, Executive Secretary of the Board of Supervisors of Chesterfield County, met to negotiate the pending annexation suit. At those meetings, the only consideration stated by Mr. Kiepper was the number of white people and black people in the area to be annexed.
>
> * * * *

Further unchallenged findings of the Master on the record before him strongly suggest that this conviction motivated Richmond's negotiation and acceptance of the 1969 annexation suit settlement agreement for which it now seeks Section 5 approval. The 1969 annexation negotiations with Chesterfield County were conducted for Richmond by its white mayor-city councilman, Phil J. Bagley. During the course of these negotiations, Mayor Bagley held meetings and con-

> (c) At a meeting in Williamsburg, Virginia, about March of 1969, City Attorney Conrad B. Mattox, Mayor Crowe, and Phil J. Bagley indicated to Irvin G. Horner, Chairman of the Board of Supervisors of Chesterfield County, that the City must annex a part of Chesterfield County or the City of Richmond would be taken over by the black population.
>
> * * * *
>
> (d) At a meeting of the Aldhiser Commission (created by the State Legislature to study the City's expansion) in July, 1968, Ed Willey and others representing the City of Richmond, said to Donald G. Pendleton, member of the House of Delegates, that the City was concerned about results of the 1970 City of Richmond Council races going all black.
>
> * * * *
>
> (e) In the fall of 1968, at a meeting with Leland Bassett at Charlottesville, Virginia, Mayor Bagley stated that "As long as I am the Mayor of the City of Richmond the niggers won't take over this town."
>
> * * * *
>
> (f) In February 1970, at the Willow Oaks Country Club, Henry Valentine of Richmond Forward, stated that the purpose of the annexation was to keep the City from going all black. City Councilman Nathan Forb was concerned about Richmond becoming another Washington, D. C.
>
> * * * *
>
> (g) On September 12, 1971, at a meeting of the Virginia Municipal League, Mayor Bagley stated to James G. Carpenter that niggers are not qualified to run the city.

ferences concerning their progress with the other five members of the Richmond City Council whose election had been endorsed by Richmond Forward, the predominantly white citizens group; the three members of the Council who had been endorsed by Crusade for Voters, the predominantly black citizens organization, were excluded from all of these meetings.[30]

Richmond's focus in the negotiations was upon the number of new white voters it could obtain by annexation; it expressed no interest in economic or geographic considerations such as tax revenues, vacant land, utilities, or schools.[31] The mayor required assurances from Chesterfield County officials that at least 44,000 additional white citizens would be obtained by the City before he would agree upon settlement of the annexation suit.[32] And the mayor and one of the city councilmen conditioned final acceptance of the settlement agreement on the annexation going into effect in sufficient time to make citizens in the annexed area eligible to vote in the City Council elections of 1970.[33] The annexation suit settlement to which the six Richmond Forward-backed members of the City Council agreed obtained for Richmond 60 per cent of the total population and 59 per cent of the school-age children, but only 51 per cent of the value of tax assessable property and 46 per cent of the total land area, of the original portion of Chesterfield County for which annexation was sought.[34]

[30]Master's Findings of Facts, No. 5.

[31]*Id.*, No. 4.

[32]*Id.*

[33]*Id.*, No. 9.

[34]*Id.*, No. 7.

The annexation seemed to have the impact the Richmond officials who supported it desired. The 1970 census revealed that the black population within the old boundaries of Richmond was 52 per cent, but within the expanded boundaries it was only 42 per cent.[35] The white citizenry was increased by the annexation by 45,705, while the black citizenry was increased by only 1,557.[36] The 1970 councilmanic elections were held on an at-large basis with the annexed Chesterfield County citizens participating. Candidates endorsed by the white citizens organization maintained their 6-3 majority on the City Council and only one black councilman was elected. None of the six elected councilmen who were endorsed by the white citizens organization received more than 8.4 per cent of the black vote.[37]

It is conceded here that Richmond conducted these elections illegally in violation of Section 5. It did not, prior to diluting by annexation the votes of the citizens residing within the old Richmond boundaries, obtain the approval of the Attorney General or a declaratory judgment from this court that this dilution did not have the purpose and would not have the effect of abridging the right to vote on account of race or color.[38] Richmond has held no councilmanic elections since 1970;[39] the illegally elected City Council continues to

[35]*Id.*, Nos. 10 & 11.

[36]*Id.*, No. 11.

[37]Defendants' Exhibit 9.

[38]*See* text at notes 12-21 *supra*.

[39]The 1972 City Council elections were enjoined by the Supreme Court under §5. *Holt v. City of Richmond*, 406 U.S. 903 (1972). Richmond is presently enjoined from holding any elections under an order of a three-judge District Court in Virginia.

serve to this time. It was only after the decision in *Perkins v. Matthews, supra,* and after the Attorney General had informed Richmond that it was in violation of the Voting Rights Act, that the City made its belated attempts to conform to the commands of Section 5. On March 8, 1971 Richmond submitted the annexation and the concomitant changes in its election practices to the Attorney General. On May 7, 1971 the Attorney General interposed an objection to the election practice changes resulting from the annexation. On December 9, 1971 Curtis Holt, Sr., a black citizen living within the old Richmond boundaries and an intervenor in the case at bar, filed an action in the District Court for the Eastern District of Virginia seeking a judgment that the annexation was without effect for lack of prior approval by the Attorney General or this court.[40] On August 25, 1972, five days prior to a scheduled hearing in this Virginia District Court case,[41] more than a year after the Attorney General objected to the annexation under Section 5, and almost two years after it had conducted its 1970 councilmanic elections in violation of Section 5, the City finally filed the instant suit in this court.

As originally filed, this suit asked us to declare nondiscriminatory in purpose and effect the annexation and concomitant changes in election practices as

[40]Holt's standing to bring such an action had been affirmed by the Supreme Court in *Allen v. State Board of Elections, supra* note 3, 393 U.S. at 554-557.

[41]Holt's §5 case was brought independently of his earlier direct 15th Amendment challenge to the annexation. *See* text at note 22 *supra* and note 43 *infra.*

instituted in 1970. It could hardly be clearer that on the Master's unchallenged and fully supported factual findings we could not have issued such a declaration. The City apparently was moved in 1962 to file its annexation suit against Chesterfield County by legitimate goals of urban expansion.[42] However, Richmond, which we again emphasize must carry under Section 5 the heavy burden of proving the absence of a discriminatory purpose as well as the absence of a discriminatory effect, offered no evidence to explain why the suit was settled in 1969 by negotiations focusing on the number of white citizens the City would obtain and after the City's controlling white officials had stated that the annexation was necessary in 1969 to avert a black political takeover of the City.[43]

[42]*See Holt v. City of Richmond, supra* note 25, 334 F.Supp. at 231.

[43]We are not, contrary to the City's arguments, precluded from finding that Richmond failed to prove the absence of a discriminatory purpose in negotiating the 1969 annexation by the decision of the 4th Circuit in *Holt v. City of Richmond,* 459 F.2d 1093, *cert. denied,* 408 U.S. 931 (1972), *reversing* E.D. Va., 334 F.Supp. 228 (1971). The *Holt* court reversed a District Court decision that the 1969 annexation compromise violated the 15th Amendment because of a discriminatory motivation. However, the 4th Circuit predicated its reversal on a line of Supreme Court cases holding that actions of legislatures are to be voided for unconstitutional motivation only in the rarest instances after the most convincing showing that the legislators could not have had legitimate goals. 459 F.2d at 1097-1100. *Compare Gomillion v. Lightfoot,* 364 U.S. 339 (1960), *with Palmer v. Thompson,* 403 U.S. 217, 224-225 (1971); *United States v. O'Brien,* 391 U.S. 367, 382-386 (1968); *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 130 (1810). The *Holt* court found that plaintiff Holt in that case had not carried such a heavy

In addition, given the Master's unchallenged finding that there was uncontroverted evidence of racial bloc voting in Richmond and the fact that almost all of the annexed citizens were white, we cannot say that the expansion of Richmond's boundaries and the concomitant changes in its election practices instituted in the 1970 councilmanic elections did not have the effect, as well as the purpose, of diluting the black vote.

We conclude, then, that Richmond's 1970 changes in its election practices following upon the annexation were discriminatory in purpose and effect and thus violative of Section 5's substantive standards as well as the section's procedural command that prior approval be obtained from the Attorney General or this court. The primary thrust of Richmond's present arguments before this court, however, is that any discriminatory purpose and effect of the annexation was purged by the City's adoption, on April 25, 1973, of a single-member district, nine-ward plan for future councilmanic elections. Richmond amended its complaint in this action and now asks us to declare that the changes in its election practices resulting from the annexation as modified by the ward plan do not have a discriminatory purpose or effect. The City thus directs its attack on

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burden of proof. This case is not brought directly under the 15th Amendment and is not controlled by the constitutional cases cited by the *Holt* court. As stated above, the Supreme Court has made clear that in a §5 declaratory judgment suit the state must carry the burden of proof that it did not have a discriminatory purpose. Indeed the 4th Circuit, like the District Court it reversed, fully understood that its decision had no effect whatever on the determination we must make under §5. 459 F.2d at 1100; 334 F.Supp. at 242.

the finding in the Master's report that the ward plan does not remove the discriminatory taint from the annexation.

Richmond undertook to develop a ward plan after the decision in *City of Petersburg, Va. v. United States, supra*, and it now relies on *Petersburg* to argue that the annexation was made lawful by the adoption of its single-member district plan. The *Petersburg* court was asked to approve under Section 5 an annexation which eliminated a black population majority in Petersburg. In light of evidence of a history of voting along racial lines in Petersburg, the court held that the City could not prove that its submitted annexation plan would not have the effect of diluting black votes. However, emphasizing the legitimate financial and geographic interests of Petersburg in the annexation *and the absence of any evidence that the annexation was accomplished for the purpose of diluting black voting power,*[44] the court suggested that if the City changed from an at-large system for electing its city council to a ward system "calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters,"[45] the annexation could pass Section 5 scrutiny.

The Master concluded that Richmond did not, under *Petersburg*, purge its annexation of illegality by its

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[44]The court specifically found that the City "expanded into those areas which were the most reasonably available and which were the most desirable for accomplishing the legitimate purposes of annexation." *City of Petersburg, Va. v. United States, supra* note 15, 354 F.Supp. at 1024.

[45]*Id.* at 1031.

adoption of a ward plan. We agree for two reasons. First, initially we find this case distinguishable from *Petersburg* in one significant respect: Richmond, unlike Petersburg, has not proved that it did not expand its boundaries for the *purpose* of abridging the voting rights of its black citizens. Second, we cannot, in any case, find that the *Petersburg* standard as to effect has been met by Richmond. We are not conviced that the ward plan adopted by Richmond was "calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters."

We will address first the importance of Richmond's failure to prove, as Petersburg did, that its annexation did not have a discriminatory purpose. We do not agree with the Master's conclusion that a city which has originally annexed territory for the purpose of maintaining a white voting majority could never prove that it no longer had such a discriminatory purpose in retaining the annexed area after adoption of a single-member district ward plan. However, we also do not agree with Richmond that a city's mere showing that it has made some effort to remove the discriminatory effect of an annexation by adoption of a ward plan is sufficient to prove that it does not retain the annexed voters for a discriminatory purpose. We realize that cities with histories of racial discrimination and bloc voting in states covered by Sections 4 and 5, even cities in which the number of black citizens is approaching a majority, may have legitimate economic reasons for desiring to expand their boundaries into surrounding areas which coincidentally contain many more white than black citizens. We think that when such a city demonstrates that its boundary expansion is

not motivated by a desire to dilute black voting power, a ward plan calculated to minimize any dilution that could occur should, as stated in *Petersburg*, save the annexation from illegality under Section 5. However, when such a city violates the Voting Rights Act by proceeding, without approval of the Attorney General or this court, with annexation of a large number of white citizens for the purpose of diluting the vote of its black citizens, an extra burden rests on that city to purge itself of discriminatory taint as well as to show that the annexation will not have the prohibited effect. To convince a court that such a city, by adoption of a ward plan, has purged itself of a discriminatory purpose in an annexation of new voters, it would have to be demonstrated by substantial evidence (1) that the ward plan not only reduced, but also effectively eliminated, the dilution of black voting power caused by the annexation,[46] and (2) that the city has some objectively verifiable, legitimate purpose for annexation.

In this case Richmond has failed to present substantial evidence that its original discriminatory purpose did not survive adoption of the ward paln. The Master concluded that the "City has failed to establish any counterbalancing economic or administrative benefits of the annexation."[47] The Master's conclusion

[46]The *Petersburg* court was fully aware that the "calculated to neutralize to the extent possible" standard which it established for annexations not motivated by a discriminatory purpose requires a city to minimize but not necessarily to remove entirely any dilution of black voting power caused by the annexation. *Id.* at 1031.

[47]Master's Conclusions of Law, No. 17.

was predicated upon findings of fact supported by direct testimony before him. The Master further found that the return of the annexed area to Chesterfield County would actually save the City at least $8.5 million of operating loss per year and $21.3 million of required capital outlay. The Master also found that only 6.25 per cent of the vacant land received by Richmond in the settlement annexation was capable of development.[48] He further concluded from the testimony of a Chesterfield County official that the County is not only financially and administratively able and willing to reassume control over the annexed area and to reimburse the City for its previous expenditures in the area, but could do so without any significant inconvenience to or detrimental effect on the annexed citizens.[49] Richmond did not offer any testimony before the Master to controvert these findings. It objects, however, to the Master's conclusion that there are no economic or administrative reasons to retain the annexed area on the basis of the record and decision in *Holt v. City of Richmond, supra.* The City cites from this record an estimate that revenues from the annexed area for fiscal year 1971-72 exceeded appropriations from it by about $1.5 million. Richmond further quotes a portion of the *Holt* decision containing the opinion of the Richmond City Manager that deannexation would be a job to "boggle the mind" and the opinion of the *Holt* court that Richmond would be in a weak bargaining position in any de-annexation negotia-

[48]Master's Findings of Facts, No. 26.

[49]*Id.*, Nos. 23-25.

tions.[50] These evidentiary references to *Holt* were, of course, considered by the Master in making his findings.[51] They do not persuade us that the Master's findings are wrong, nor do they dissipate the evidence of illegal purpose which permeates this record.[52]

[50]324 F.Supp. at 238-239. Intervenor Crusade for Voters argues that the addition of white children from the annexation would aid school desegregation efforts in Richmond. We take note of *Bradley v. School Board of City of Richmond, Va.*, 4 Cir., 462 F.2d 1058 (1972), *affirmed by equally divided Court*, 412 U.S. 92 (1973), which held that the 14th Amendment did not require Richmond to merge its school system with those of surrounding Henrico and Chesterfield Counties in order to effect full integration of these school systems. However, the history of Richmond's resistance to the mandate of *Brown v. Board of Education*, 347 U.S. 483 (1954), *see Bradley v. School Board of City of Richmond, Va., supra*, at 1074-1076 (Winter, J., dissenting), causes us to doubt that Richmond's white leadership has at any time been motivated by the cause of school desegregation to maintain the expansion of Richmond's boundaries.

[51]Richmond also refers the court to a study by the Urban Institute showing a 1971 fiscal year surplus from the annexed area. This study was not made part of the record before the Master, however, *see* Transcript of Master's Hearing (hereinafter Tr.) 606-607, and it could not in any case remove the doubts created by testimony at the hearing.

[52]We emphasize again that we do not doubt that Richmond's leadership was motivated in 1962 by nondiscriminatory goals in filing its 1962 annexation suit. We simply question that the City has established benign purposes for retaining the particular 1969 compromise annexation negotiated for the purpose of diluting black voting power.

Moreover, because the City has failed to demonstrate that its ward plan effectively removes the dilution of black voting power caused by the annexation, even if we were convinced that Richmond now has legitimate reasons for annexation and for resisting de-annexation, we would still not be convinced that the City's discriminatory purpose does not linger. The City maintains that its ward plan actually enhances black voting power in Richmond. The single-member districting plan adopted by the City includes four wards with heavy white population majorities, four wards with heavy black population majorities, and one ward which is 40.9 per cent black.[53] Richmond contends that this plan assures the black citizenry of four seats on the Council and at least gives them some hope of capturing a fifth seat. Richmond argues that this is more political power than blacks could have in an at-large system within Richmond's old boundaries because, while blacks have a population majority within these boundaries, they still comprise only 44.8 per cent of the voting-age population. Although Richmond's argument has considerable force on its surface, we are not convinced by it that Richmond's ward system sufficiently compensates for the dilution of black voting power caused by the annexation.

First, we think it our responsibility under Section 5 to thwart attempts of covered states to dilute the potential future voting power of black citizens as well as their present voting strength. The fact that the percentage of Richmond blacks of voting age is appreciably less than the percentage of blacks in the

[53]Attachment to plaintiff's Exhibit 18; Tr. at 615.

total population of course means that there are proportionately more black youngsters. We, like the white political leadership of Richmond, can anticipate that the present black population majority within Richmond's old boundaries will translate in a few years into a voting-age majority.[54] In an at-large system such a majority would ensure that none of the nine City Council seats was occupied by a candidate who appealed only to a white voting bloc, ignoring the needs and aspirations of Richmond's black citizens. The unchallenged findings of the Master indicate that the Richmond white political leadership in the late 1960's feared that absent annexation the black population would gain an electoral majority some time in the 1970's. We cannot say, in light of population growth trends in Richmond, that the Richmond City Council was not still motivated by that fear in adopting a ward plan to avoid de-annexation.[55]

[54]The population figures on which Richmond relies are taken from the 1970 census results. Translation of the population majority into a voting-age majority may have already occurred.

[55]Richmond has not suggested to us that we focus on the percentage of registered voters who are black. To do so would of course be circular; a primary reason why black registration has been low relative to that of whites is the black citizen's awareness that his vote has traditionally had less impact. *Cf. Zimmer v. McKeithen*, 5 Cir., 485 F.2d 1297, 1306 (1973) (*en banc*); *Beer v. United States*, D. D.C., ___ F.Supp. ___, ___ (Civil Action No. 1495-73, March 15, 1974) (slip op. at 70-71). The Voting Rights Act was enacted to render a future transformation in the reality on which that black awareness was based. In stressing the total black population percentage, we look toward that future transformation.

Second, it is not clear to us that Richmond's black citizenry would not have greater actual political power in an at-large, de-annexed system than in a single-member ward, annexed system even before their overall population majority resulted in a voting-age majority.[56] The Master's findings on the concerns of the City's white leadership, as well as testimony of the black Richmond leadership before the Master,[57] suggest that

[56]We must look beyond percentages, whether they be of total populations or of voting-age populations, to determine the effect of the boundary expansion on the voting power of blacks and their access to the political process. As the 5th Circuit has recently stated:

> * * * Inherent in the concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable; and second, that assuming substantial equality, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population. Both the Supreme Court and this court have long differentiated between these two propositions. And although population is the proper measure of equality in apportionment, in Whitcomb v. Chavis, 403 U.S. 124, 149-150, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971) and White v. Regester, *supra*, 412 U.S. at 765, 93 S.Ct. at 2339, 37 L.Ed.2d at 324, the Supreme Court announced that access to the political process and not population was the barometer of dilution of minority voting strength.

Zimmer v. McKeithen, supra note 55, 485 F.2d at 1303 (footnotes omitted). In *Georgia v. United States, supra* note 3, 411 U.S. at 531, the Supreme Court admonished that §5 is concerned "with the reality of changed practices as they affect Negro voters."

[57]Tr. at 617-618.

political power in Richmond turns on controlling five majority seats on the City Council[58]; three or even four seats provide forums from which to voice dissents, but not to wield effective power. There is good reason to think that blacks would have a greater opportunity to elect five councilmen responsive to their concerns and interests in an at-large system within Richmond's old boundaries than in a ward system operating within the expanded boundaries.

We note that, because past recent voting has only been roughly along racial lines, three councilmen who have predominantly appealed to black voters were elected in 1970 in the face of a black voting-age minority of 37.3 per cent.[59] If the black voting-age minority was increased by de-annexation to 44.8 per cent, two or more additional candidates who appealed to black voters might well be elected. The potential for this happening may be greater than the potential for election of a fifth black voting bloc-supported councilman from what the City has characterized as the "swing ward" in their ward system. For though the City stresses a 40.9 per cent overall black population percentage in this ward, the black voting-age population is only 38.5 per cent.[60] Since substantial doubt exists that the dilution of the black vote caused by the annexation was eliminated by adoption of the ward plan,[61] it appears that the white political leadership

[58]The mayor has been elected from and by the City Council.

[59]Tr. at 219.

[60]Tr. at 616.

[61]Because of our understanding of the political importance of obtaining a majority on the City Council, we have not included

presently in control of Richmond adopted the ward system for the purpose of doing what they could to maintain the dilution of the black vote produced by annexation. Richmond did not carry the heavy burden we think must be imposed on a city which argues that adoption of a single-member district ward plan purges its discriminatory purpose in annexing white citizens.[62]

In addition to a discriminatory purpose, the annexation also had a discriminatory effect under the

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in our analysis the effect of the annexation on the black voting bloc's influence on the election of the City's five "constitutional" officers: Commonwealth's attorney, city treasurer, commissioner of revenue, sheriff, and clerk of court. These officers, whose positions are provided for in the Virginia Constitution, *see* Art. VII, §4 (1973); *see also* VA. CODE §15.1-40.1 (1973), are of necessity elected on an at-large basis. Thus with respect to these officers the ward system does nothing to counteract the dilution of the black vote caused by the annexation. *See generally City of Petersburg, Va. v. United States, supra* note 15, 354 F.Supp. at 1029-1030.

[62]The above discussion of our doubts that Richmond's ward plan eliminated the dilution of black voting power caused by the annexation renders academic Richmond's claim that when a state or subdivision demonstrates that a change in a practice or procedure has no discriminatory effect the absence of a discriminatory purpose should be presumed under §5. We pause, however, to register our firm disagreement with Richmond's position. Section 5 requires the state to carry the burden of proof on two interrelated but independent issues: (1) whether there will be a discriminatory effect, and (2) whether there was a discriminatory purpose. *See, e.g., City of Petersburg, Va. v. United States, supra* note 15, 354 F.Supp. at 1027. Carrying the burden on the first issue cannot reverse the burden on the second.

Petersburg standard since the ward plan was not "calculated to neutralize to the extent possible any adverse effect upon the participation of black voters." The Master did not find, and indeed on the basis of the evidence before him could not find, that Richmond fashioned its ward plan "to neutralize to the extent possible" the dilution of black voting power caused by the annexation.[63] As found by the Master on the basis of undisputed testimony before him, Richmond's ward plan was drawn by Dallas H. Oslin, senior planner for the City, without reference to the racial living patterns in Richmond. Oslin, a lone-wolf worker, testified before the Master that the only direction he received from the City was to keep the wards within a four to five per cent variance from population equality[64] and that he did not even know, beyond rough impressions, the locations of Richmond's black population.[65] Oslin framed the ward plan on the basis of factors such as

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[63]Richmond seems to interpret *Petersburg* to mean that, where a city elects its city council under a ward system, any expansion of its boundaries can defeat a §5 challenge. This interpretation not only is contradicted by the plain language of *Petersburg*, requiring the city to "neutralize *to the extent possible* any adverse effect upon the political participation of black voters," 354 F.Supp. at 1031 (emphasis added), but also collapses under simple analysis. For if Richmond's position were adopted, the incumbent white political leadership of a city which already elected its councilmen under a single-member district ward system could, without running afoul of §5, selectively annex as many additional white wards as it anticipated it needed to maintain the city's white political predominance. Surely Congress did not intend §5's "severe *** procedure for insuring that States would not discriminate on the basis of race in the enforcement of their voting laws," *Allen v. State Board of Elections, supra* note 3, 393 U.S. at 556, to be so easily circumvented.

[64]Tr. at 293-294.

[65]Tr. at 306-308.

"compactness," "physical boundaries," and "likeness of area."[66] While Richmond could have legitimately taken these factors into account, they should have been accommodated to the goal of minimizing dilution of the black vote.[67]

Our conclusion that the City's ward plan does not "to the extent possible" minimize dilution of the black vote is further buttressed by an alternative ward plan developed and submitted to the court by intervenor Crusade for Voters. The Crusade plan provides for four heavily white wards, four heavily black wards, and a "swing ward" with a 47.8 per cent black population.[68] Since this "swing ward," much more than the 40.9 per cent black "swing ward" in the City's plan, provides a

[66]Master's Findings of Facts, No. 19.

[67]Without reference to racial living patterns, Oslin drew four ward plans which were submitted to the Attorney General during the pendency of this suit. The Attorney General notified Richmond that if it made some minor modifications in one of these ward plans it would meet the *Petersburg* standard. It is this ward plan as modified in accordance with the Attorney General's suggestion which the City adopted and submits to us.

[68]Attachment to Exhibit 21 of defendant-intervenor Crusade for Voters. Crusade asks that we approve the City's annexation as modified by Crusade's ward plan. Our special function under §5, however, is to approve practices and procedures with respect to voting submitted by covered states or their subdivisions. Richmond has not adopted or submitted Crusade's plan. Though the effect of a plan may be anticipated in advance of its adoption, *cf. City of Petersburg, Va. v. United States, supra* note 15, we cannot give full consideration to whether a city has a discriminatory purpose in adopting a plan before it actually does so.

candidate supported by blacks an opportunity to be elected to the critical fifth seat on the City Council, Crusade's plan suggests that the City could have done more to compensate for the dilution of black voting power caused by the annexation. Thus even if Richmond had placed this case in the posture of *Petersburg* by proving the absence of any discriminatory purpose, it would still be an abuse of the heavy responsibility placed upon us by Section 5 to grant the declaratory judgment the City seeks.

III

Our denial of Richmond's request for a declaratory judgment does not end this case for intervenor Holt, nor did it end the case for the Master. Holt requests and the Master recommends that this court enjoin Richmond to de-annex the land obtained from Chesterfield County in order that a new councilmanic election can be immediately held within the old boundaries of Richmond.[69]

There are indeed strong equities in favor of such an injunction. Since those individuals who were annexed by Richmond must be permitted to be full voting citizens of the community in which they reside, a Richmond election which denied these individuals the

[69]The Master properly titled his recommendation of a de-annexation order a conclusion of law. As such, we need not give it the deference of the "clearly erroneous" standard appropriate under Rule 53(e) for findings of fact. *See* note 2 *supra*.

vote would require de-annexation.[70] Yet the citizens of Richmond living within the old boundaries can voice a strong claim for the immediate conduct of an election within the old boundaries to remove the present City Council. These citizens have not had an opportunity since 1968 to cast a ballot in an election which was not violative of the 1965 Voting Rights Act. The present City Council was elected in the 1970 elections and serves today several years after Richmond was notified that these elections were held in violation of Section 5. The 1970 elections were illegal because they were conducted pursuant to a change in a practice or procedure of voting without approval being obtained from this court or the Attorney General. Our denial of Richmond's request for *ex post facto* approval of its 1970 change in election practices underscores the illegality of these elections. The Supreme Court has stated that Section 5

> essentially freezes the election laws of the covered States unless a declaratory judgment is obtained in the District Court for the District of Columbia holding that a proposed change is without discriminatory purpose or effect.* * *

Georgia v. United States, 411 U.S. 526, 538 (1973).[71] For four years now Richmond has avoided this

[70]*See Holt v. City of Richmond, supra* note 25, 334 F.Supp. at 239.

[71]*See also* Joint Views of 10 Members of the [Senate] Judiciary Committee Relating to Extension of the Voting Rights Act of 1965, 116 CONG. REC. (Part 4) 5517, 5519 (March 2, 1970), *quoted* in *City of Petersburg, Va. v. United States, supra* note 15, 354 F.Supp. at 1028.

intended "freezing" effect; intervenor Holt asks only that we return Richmond to the position it would be in today had it followed the procedures of Section 5 in accordance with congressional intent.[72]

The City of Richmond and the Attorney General argue that, whatever the equities, this court does not have jurisdiction to order de-annexation. We disagree. Richmond and the Attorney General base their argument on the first opinion in *Beer v. United States*, D. D.C., ___ F.Supp. ___ (Civil Action No. 1495-73, January 4, 1974) (hereinafter *Beer I*). The *Beer I* court was asked by the City of New Orleans, Louisiana to declare nondiscriminatory in purpose and effect a plan of redistricting for councilmanic elections. New Orleans had not held elections under the new plan for which it sought approval. Several nonincumbent candidates for the City Council in New Orleans petitioned the *Beer I* court, during its consideration of New Orleans' request, to establish a schedule for councilmanic elections. The court refused to consider the merits of the candidates' petition, stating that it was without power to grant the relief requested.

[72]Words from *Perkins v. Matthews, supra* note 3, also reverberate loudly against Richmond's evasion of §5's intent:

> * * * [B]ased upon ample proof of repeated evasion of court decrees and of extended litigation designed to delay the implementation of federal constitutional rights, Congress expressly indicated its intention [in enacting §5] that the States and subdivisions, rather than citizens seeking to exercise their rights, bear the burden of delays in litigation.

400 U.S. at 396 (footnote omitted).

We think the *Beer I* case distinguishable on its facts. We are asked merely to employ our equitable power to enforce the mandate of Section 5 that election procedures be frozen in covered states until a declaratory judgment of approval has been obtained from this court. We are asked to declare void and remove the effects of those procedures and practices which were not to be implemented without the approval of this court—an approval which we herein deny. The *Beer I* court, which was not presented as are we with the *fait accompli* of a past election held under illegal practices and procedures, itself enjoined future elections under New Orleans' unapproved redistricting plan.[73] The *Beer I* court only balked when it was asked to schedule local councilmanic elections and thus to probe issues "tangential"[74] to the command of Section 5 that election practices and procedures not be changed without prior approval.

We do not assent to any language in the *Beer I* opinion which does suggest that this court has jurisdiction only to grant or deny a declaratory judgment sought by a covered state or its subdivision. Such a limitation on our power would remove from us "the broad equitable jurisdiction that inheres in courts" to give effect to the policy of the legislature which they oversee, *Porter v. Warner Holding Co.*, 328 U.S. 395,

[73]The *Petersburg* court, also not confronted by the effects of an already conducted illegal election, issued a similar injunction, restraining Petersburg from holding any elections within its expanded boundaries before §5 approval for the annexation was obtained. *See* 354 F.Supp. at 1023-1024.

[74]*Beer v. United States*, D. D.C., ___ F.Supp. ___, ___ (Civil Action No. 1495-73, Jan. 4, 1974) (slip op. at 9).

403 (1946). The Supreme Court again made clear this year that a court is presumed to be able to wield "the inherent powers of an equity court" in implementing a congressional policy with which it is entrusted. *Renegotiation Board v. Bannercraft Clothing Co.*, ___ U.S. ___, ___, 42 *U.S. L. Week* 4203, 4209 (February 19, 1974).

> * * * Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown v. Swann*, 10 Pet. 497, 503. * * *

Porter v. Warner Holding Co., supra, 328 U.S. at 398.[75] We perceive no clear indication in the Voting Rights Act or its legislative history that Congress, when entrusting this court with responsibility under Section 5, meant to limit our power to enforce the section's direct command that voting practices and procedures not be changed without prior approval.[76] The *Beer I*

[75]*See also Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 290-291 (1960); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 16-17 (1942). It is interesting to note that the declaratory judgment statute itself provides for equitable relief, at least when a declaratory judgment is granted.

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. §2202 (1970).

[76]The fact that the Voting Rights Act does not explicitly empower this court to issue on the motion of private parties

court stressed that *Allen v. State Board of Elections, supra,* made clear that, while a local three-judge District Court can determine whether a given administrative change is covered by Section 5 and can enjoin its implementation prior to approval if it is covered, only a three-judge District Court in the District of Columbia can declare that a covered change does not have a discriminatory purpose or effect. But we do not think it evident that Section 5's limitation on the power of local three-judge District Courts by placing declaratory judgment authority exclusively in our hands limits our equitable jurisdiction by making this declaratory authority exclusive of all other power.[77]

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injunctions voiding past implementation of practices and procedures which have failed to obtain approval under §5 does not constitute such an indication. Congress did not explicitly authorize any court to enter such injunctions on the motion of private parties, yet the Supreme Court has at least made clear that local three-judge District Courts have authority to consider requests of private parties to invalidate illegal elections and order the conduct of new ones. *See Allen v. State Board of Elections, supra* note 3, 393 U.S. at 554-557.

[77]The "strong" reason which the *Allen* Court offered for its interpretation of §5's limitation on the power of local three-judge District Courts does not support a reciprocal limitation on the power of this court. The *Allen* Court noted that, whereas suits to require submission of an electoral change for approval will often be brought by aggrieved private citizens who might be greatly burdened by having to come to the District of Columbia to bring suit, the states who must bring declaratory judgment actions can afford the costs of litigating here. 393 U.S. at 559. If the private citizen has already intervened in a state-initiated declaratory judgment action before this court, it would be ridiculous for us to refuse to grant an injunction because it would have been less of a burden on him to have requested it in a local District Court.

Though we believe we do have jurisdiction to enforce the direct command of Section 5 by enjoining the annexation in order that councilmanic elections within Richmond's old boundaries can be immediately held, we nonetheless refrain from doing so. Our restraint derives from the same considerations which we suspect ultimately underlay the *Beer I* court's decision: hesitancy "to become involved in the intricacies of local political redistricting * * * or * * * to take over the traditional responsibility of a local court to resolve questions more conveniently litigable before its bench." *Beer I, supra,* ___ F.Supp. at ___ (slip opinion at 10).

We are particularly influenced by the Supreme Court's handling of the remedial issue in *Perkins v. Matthews, supra.* Though the *Perkins* Court held that Canton, Mississippi had violated Section 5 by allowing annexed citizens to vote in its 1969 elections without obtaining prior approval from this court or the Attorney General, the Court refused to set aside the 1969 elections and order immediate new elections within Canton's old boundaries. The Court instead remanded the case to the local three-judge District Court, emphasizing that since the local court was "more familiar with the nuances of the local situation than are we," "the question of the appropriate remedy is for that court to determine, in the first instance * * *."[78]

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[78]400 U.S. at 397. In both *Allen v. State Board of Elections, supra* note 3, and *Georgia v. United States, supra* note 3, states had also held elections under new practices and procedures with respect to voting without obtaining the requisite prior approval. The Supreme Court refrained from ordering immediate new elections under the old practices and procedures in each case. However, the Court's stated reason for refraining is in neither

Perkins involved review of a local District Court's failure to require Canton to submit its changed procedures for approval, and the Supreme Court suggested that the case for ordering new elections under old procedures would be stronger if, as in our case, approval was sought and not obtained.[79] However, we think the local District Court's familiarity "with the nuances of the local situation" is as relevant here as in *Perkins*; we are no more aware of these nuances in our case than was the Supreme Court in *Perkins*. The local District Court can better balance all relevant factors, including our refusal to grant Richmond a declaratory judgment, in deciding whether to order de-annexation.

As noted above, intervenor Holt has already filed in the District Court for the Eastern District of Virginia an action seeking a judgment that the annexation was without effect for lack of prior approval by the Attorney General or this court. Proceedings in that action have been stayed pending decision in this case. We perceive no reason why Holt cannot repair to the District Court in Virginia and obtain not only fair, but also more fully informed, consideration of his request for de-annexation.

It should be totally clear by this point, however, that our refusal to order de-annexation and immediate new elections does not mean that Richmond is free to hold

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case relevant here. In *Allen* the Court stressed that the "§5 coverage questions involve[d] complex issues of first impression." 393 U.S. at 572. And in *Georgia* the Court noted that the elections had been conducted under the disputed new procedures by reason of its own stay order. 411 U.S. at 541.

[79] 400 at U.S. 396-397.

more elections within its expanded boundaries. Because of our denial of the declaratory judgment it sought, Richmond continues to be restrained by Section 5 from holding elections in which individuals residing within the annexed area are permitted to participate.

The application for declaratory judgment is denied.

/s/J. Skelly Wright
J. SKELLY WRIGHT
UNITED STATES CIRCUIT JUDGE

/s/ [unsigned]
WILLIAM B. JONES
UNITED STATES DISTRICT JUDGE

/s/June L. Green
JUNE L. GREEN
UNITED STATES DISTRICT JUDGE

Washington, D.C.

JONES, District Judge: I concur in the result as well as in Parts I and II of Judge Wright's opinion. I dissent from Part III of that opinion which states that this Court has jurisdiction "to enforce the direct command of Section 5 by enjoining the annexation in order that councilmanic elections within Richmond's old boundaries can be immediately held * * *."

/s/ William B. Jones
William B. Jones
United States District Judge

APPENDIX C

[Caption omitted in printing.]

FILED
Jan 21 1974
James F. Davey, Clerk

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Jurisdiction

This matter was referred to United States Magistrate Lawrence S. Margolis appointed as Special Master by U.S. Court of Appeals Judge J. Skelly Wright, and U.S. District Court Judges William B. Jones and June L. Green under Rule 53(c) of the Federal Rules of Civil Procedure "for a hearing on the merits and to take testimony on the issue of whether the City of Richmond annexation plan as amended has the purpose or the effect of diluting the black vote in that City." Subsequent instructions from the three-judge Court expanded the issue to be heard to cover the entire scope of the annexation by the City of Richmond. Upon consideration of the record, the testimony and documentary evidence adduced at the hearing on October 15, 16 and 17, 1973, and after oral argument by counsel for the respective parties on December 19, 1973, the Special Master makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACTS

1. The *facts* as found by the U.S. District Court in *Holt v. City of Richmond.* 334 F.Supp. 228 (1971),

459 F.2d 1093 (1972), *cert. denied* 408 U.S. 931 (1972), are incorporated herein by reference. U.S. District Court Judge Robert R. Merhige, Jr., found that the City of Richmond annexation plan, i.e., the annexation of 23 square miles of Chesterfield County, had the purpose and the effect of diluting the black vote in that City. The record in that case has been stipulated to by the parties in this action.

A. History of the Annexation

2. On January 2, 1962, the City of Richmond filed an Annexation Suit against the County of Chesterfield, Virginia, seeking the annexation of 51 square miles of Chesterfield County.

Holt v. Richmond, supra.

3. On May 15, 1969, a compromise boundary line, known as the Horner-Bagley Line was drawn, by which approximately 23 square miles of Chesterfield County would be annexed by the City of Richmond. (At that time, Phil J. Bagley was the Mayor of Richmond and Irvin G. Horner was the Chairman of the Chesterfield County Board of Supervisors.)

Testimony of Melvin W. Burnett, Record, p. 118 *Holt v. Richmond*

Testimony of Irvin G. Horner, Record, pp. 173, 174 *Holt v. Richmond*

Testimony of Phil J. Bagley, Jr. Record, pp. 413-420 *Holt v. Richmond*

4. The Horner-Bagley Line was agreed upon after extensive secret negotiations between representatives of

the City of Richmond and representatives of Chesterfield County. In all meetings, with regard to settlement, the City maintained a consistent position that required all negotiations to center upon the number of white people the City would receive by settlement. All economic, geographic, or other considerations such as utilities, schools, vacant land, and tax revenues were brushed aside. The final line was not actually drawn until the Mayor of the City, Phil J. Bagley, had assurances from the representatives of the County that at least 44,000 white people would be given up by the County.

Testimony of Melvin W. Burnett, Record, pp. 92-112, 120 *Holt v. Richmond*

Testimony of Irvin G. Horner, Record, pp. 145-179 *Holt v. Richmond*

5. At all times during the course of the negotiations with representatives of Chesterfield County, the Mayor was in constant contact with six Richmond City Councilmen endorsed by Richmond Forward, a white citizens organization. All council representatives of the black citizens were, however, systematically excluded from all meetings and conferences. The Council representatives of the black citizens knew nothing of the policy questions involving the annexation until after they became public knowledge.

Testimony of Henry L. Marsh, Record, pp. 64-71, 80-81 *Holt v. Richmond*

Testimony of Melvin W. Burnett, Record, p. 102 *Holt v. Richmond*

Testimony of Donald G. Pendleton, Record, pp. 215-216 *Holt v. Richmond*

Testimony of James G. Carpenter, Record, pp. 226-227 *Holt v. Richmond*

Testimony of Thomas J. Bliley, Record, pp. 350, 353-355 *Holt v. Richmond*

Testimony of Phil J. Bagley, Jr., Record, pp. 423-424, 431-432 *Holt v. Richmond*

Testimony of Alan F. Kiepper, Record, pp. 563, 567, 570-572, 611-614, 619-621 *Holt v. Richmond*

6. During the course of the annexation proceedings and thereafter, various City officials made statements on the annexation as follows:

(a) About 1966, at Farmville, Virginia, City Councilman James Wheat stated that the City of Richmond needed 44,000 leadership-type white affluent people.

Testimony of Irvin G. Horner, Record, p. 152 *Holt v. Richmond*

(b) Between July 16, 1968 and Septmeber 12, 1968, Alan F. Kiepper, Richmond City Manager, and Melvin W. Burnett, Executive Secretary of the Board of Supervisors of Chesterfield County, met to negotiate the pending annexation suit. At those meetings, the only consideration stated by Mr. Kiepper was the number of white people and black people in the area to be annexed.

Testimony of Melvin W. Burnett, Record, pp. 97-111 *Holt v. Richmond*

(c) At a meeting in Williamsburg, Virginia, about March of 1969, City Attorney Conrad B. Mattox, Mayor Crowe, and Phil J. Bagley indicated to Irvin G. Horner, Chairman of the Board of Supervisors of Chesterfield County, that the City must annex a part of Chesterfield

County or the City of Richmond would be taken over by the black population.

Testimony of Irvin G. Horner, Record, pp. 162-165 *Holt v. Richmond*

(d) At a meeting of the Aldhiser Commission (created by the State Legislature to study the City's expansion) in July, 1968, Ed Willey and others representing the City of Richmond, said to Donald G. Pendleton, member of the House of Delegates, that the City was concerned about the results of the 1970 City of Richmond Council races going all black.

Testimony of Donald G. Pendleton, Record, pp. 212-213 *Holt v. Richmond*

(e) In the fall of 1968, at a meeting with Leland Bassett at Charlottesville, Virginia, Mayor Bagley stated that "As long as I am the Mayor of the City of Richmond the niggers won't take over this town."

Testimony of Leland Bassett, Record, pp. 165-168 *Holt v. Richmond*

(f) In February 1970, at the Willow Oaks Country Club, Henry Valentine of Richmond Forward, stated that the purpose of the annexation was to keep the City from going all black. City Councilman Nathan Forb was concerned about Richmond becoming another Washington, D.C.

Testimony of George W. Jones, Record, pp. 253-255 *Holt v. Richmond*

Testimony of Roger C. Griffin, Record, pp. 270-274 *Holt v. Richmond*

Testimony of Ronald P. Livingston, Record, pp. 294-298 *Holt v. Richmond*

(g) On September 12, 1971, at a meeting of the Virginia Municipal League, Mayor Bagley stated to James G. Carpenter that niggers are not qualified to run the city.

Testimony of James G. Carpenter, Record, p. 230 *Holt v. Richmond*

7. The area of Chesterfield County annexed to the City of Richmond contained 51% of the value of the tax assessable property in the original area sought to be annexed, 59% of the school-age children, 60% of the total population, and 46% of the total land area.

Plaintiff's Exhibit No. 15, *Holt v. Richmond* Record
Defendant's Exhibit no. 12

8. Annexations in Virginia become effective at midnight on December 31 of the year in which the annexations would go into effect.

Virginia Code §15.1-1041(d).

9. Mayor Bagley and Councilman Davenport made acceptance of the Horner-Bagley Line conditioned on the fact that the annexation would go into effect January 1, 1970, and the people in the annexed area would be eligible to vote in the City Council elections of 1970. On July 12, 1969, the Circuit Court of Chesterfield County, Virginia, entered a final order of annexation awarding the City of Richmond approximately 23 square miles of Chesterfield County. The annexation became effective on January 1, 1970.

Testimony of Irvin G. Horner, Record, pp. 177-178 *Holt v. Richmond*

Basic Demography

10. The population of the City of Richmond, Virginia, as of 1970, *not* including the portion of Chesterfield County which was annexed on January 1, 1970, was 202,359 of which 104,207 (52%) were black and 98,152 (48%) were white.

Holt v. Richmond, 334 F.Supp. 240

11. The population of the annexed area of Chesterfield County as of 1970 was 47,262 of which 1,557 were black and 45,705 were white. After annexation, the population of the City of Richmond was approximately 58% white and 42% black.

Holt v. Richmond, 334 F.Supp. 240

12. The evidence that there is significant and widespread voting by blacks for black candidates and voting by whites for white candidates in the City of Richmond is uncontroverted.

Defendant's Exhibits No. 3-10

History of the Voting Rights Action

13. On January 28, 1971, the annexation and the concomitant changes in election practice and procedure were submitted to the Attorney General of the United States for his review pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

Plaintiff's Request for Admission of Fact No. 7 and Parties' Response Thereto.

14. On May 7, 1971, the Attorney General interposed an objection to the voting change which resulted from

the annexation. On September 30, 1971, the Attorney General refused to withdraw the objection.

Plaintiff's Request for Admission of Facts No. 8 and No. 9 and the Parties' Responses Thereto.

15. On August 25, 1972, the instant action was filed by the City of Richmond as a result of the Attorney General's objection. Subsequently, Curtis Holt, Sr., and the Crusade for Voters of Richmond were permitted to intervene by the three-judge court.

Preparation of Ward Plans

16. During 1971, the City of Richmond prepared several possible ward plans for dividing the City into Council election districts.

Plaintiff's Exhibits No. 12 and No. 13; Transcript, pp. 213, 295-297

17. Ward plans were presented and discussions were held from time to time between counsel for the City and the U.S. Department of Justice during the pendency of the instant case. The resulting final revised plan "D" was approved by the United States. On May 1, 1973, the Richmond City Council formally adopted the newly prepared ward plan dated April 25, 1973.

Plaintiff's Exhibits No. 15 and No. 17; Transcript, pp. 58-60, 114, 300-301

18. Dallas H. Oslin, Senior Planner for the City, assumed the task of drawing the plans.

Transcript, pp. 90-93

19. The plans the Dallas H. Oslin prepared were non-racially drawn. He used the guidelines or criteria of equal components (equality of population in each of nine wards), compactness of each ward, contiguity, likeness of area and responsibility, following geographical and physical boundaries, and maintaining the integrity of districts and communities of interest within each ward as much as possible.

Transcript, pp. 215-216, 225, 273, 275

20. While Oslin knew generally the black and white neighborhoods in the City, he did not draw his plans with racial divisions in mind. There is no evidence that in drawing, analyzing, or adopting any ward plans, the City made any attempt to minimize the dilution of the black vote which had been caused by the annexation. Olson did not use the census information on race until after the plans were initially drawn.

Transcript, pp. 215-216, 306-308

21. Two other City witnesses, Mayor Thomas Bliley and A. Howe Todd, generally agreed that the factors noted by Oslin were the proper ones to be used.

Testimony of Thomas Bliley, Transcript, pp. 63-64

Testimony of A. Howe Todd, Transcript, pp. 344-345, 424-425

22. The City of Richmond did not prove that its interest in avoiding wards which straddle the James River is sufficient to justify a dilution of the black vote.

De-annexation

23. Chesterfield County is financially able to re-annex the 23 square miles in dispute:

(a) Chesterfield County has 18 million dollars in the bank.

(b) The County has 10 to 12 million dollars due from the Water Control Board.

(c) The County has 4 to 5 million dollars in a water fund.

(d) The County has 1 million dollars in uncommitted revenue sharing.

(e) The County has 12.7 million dollars of authorized school bond issue.

(f) All Chesterfield County capital outlays with the exception of schools and utilities are paid from current revenue.

Testimony of Melvin W. Burnett, Transcript, pp. 688-689

24. Chesterfield County is administratively capable of resuming all services to the annexed area:

(a) The County School system is innovative and capable of reabsorbing the children.

(b) The County could utilize the recently constructed city fire facilities, and has just recently expanded its own fire department.

(c) The County could carry hose converters on its trucks temporarily so as to adapt to City-built fire-fighting implements.

(d) The County Police Department has a sufficient waiting list and sufficient available overtime.

(e) Trash and garbage collection would be handled by the same private contractor.

(f) The water supply of the County is superior to that of the City, and the County could use almost every water line installed by the City.

(g) The County could utilize the City-installed sewer lines.

(h) All City records with regard to utilities, assessments, taxes, etc., are computerized and can be easily obtained from the City computer for use in the County computer.

Testimony of Melvin W. Burnett, Transcript, pp. 682-687

25. Chesterfield County is willing to reassume governmental control over the annexed area and could do so in 30 days after an order of de-annexation.

Testimony of Melvin W. Burnett, Transcript, pp. 683, 684, 697

26. The City of Richmond will not suffer any substantial economic deprivation if de-annexation is ordered:

(a) The City has spent only 7 million dollars in the annexed area to date, with 21.3 million dollars which must be spent within the next 2-½ years.

(b) The City suffers an annual net financial loss of between 8.5 million and 17 million dollars from the annexed area.

(c) Of the vacant land received, only 6-¼% of it is capable of development.

(d) The return of the annexed area would thus save the City at least 8.5 million dollars of operating loss per year, and 21.3 million dollars of required capital outlay. The City would also realize bond assumptions and cash reimbursements in excess of 7 million dollars.

Testimony of Melvin W. Burnett, Transcript, pp. 692-695

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c.

2. Plaintiff is a political subdivision of the Commonwealth of Virginia with respect to which the provisions of said section are in effect. 30 F.R. 9897, August 7, 1965.

3. Changing boundary lines by an annexation which enlarges the City's number of eligible voters constitutes a change of a "standard, practice, or procedure with respect to voting" as contemplated under 42 U.S.C. 1973c. The annexation of land from Chesterfield County on January 1, 1970 and the changes resulting therefrom are within the scope of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. *Perkins v. Matthews*, 400 U.S. 379 (1971); *City of Petersburg, Virginia v. United States*, 354 F. Supp. 1021, (D.C. D.C. 1972), *aff'd* 410 U.S. 962 (1973).

4. In seeking to meet the requirements of Section 5 for enforcement of voting changes brought about by the annexation, the City of Richmond carries the burden of proving that the changes in election procedures (1) Do *not* have the *purpose* of denying or abridging the right to vote on account of race or color and that they (2) Do *not* have the *effect* of denying or abridging the right to vote on account of race or color, 42 U.S.C. 1973c. In *Holt v. Richmond*, the burden of proof was

placed upon the plaintiff Holt to show that there were violations of the Fifteenth Amendment by the defendant City of Richmond. For these reasons, the doctrines of *res judicata* and collateral estoppel urged by plaintiff to bar consideration by this Court of the purpose of the annexation do not apply in this case. Also in *Holt v. Richmond* 459 F.2d 1073, 1100 (1972), the Fourth Circuit Court of Appeals noted that its holding indicating no violation of any Fifteenth Amendment right by the annexation "reflects no opinion as to the appropriateness or inappropriateness of the Attorney General's objection [in a Voting Rights Act case]."

5. Although an annexation may be benignly conceived, racial intent may later permeate the annexation plan so as to obviate the initial benign purpose.

6. It is necessary to look at the purpose of the annexation at the time of implementation as well as at the time of its conception to determine whether there has been compliance with the Voting Rights Act.

7. The City of Richmond has not met its burden of proving that the annexation of January 1, 1970, even as modified by the nine ward City Council plan. did not have the purpose of diluting the right to vote of the black citizens of Richmond, particularly in the light of the finding of racial purpose by U.S. District Court Judge Robert R. Merhige, Jr., in *Holt v. City of Richmond,* 334 F. Supp. 228, 236, and the Record in this case.

8. The acceptance of a ward plan in *City of Petersburg v. United States, supra,* is not controlling in this case, since that decision was based on the finding that the

annexation was *not* for the purpose of denying blacks the right to vote on account of race or color.

9. Ward plans, no matter how equitably drawn, cannot serve to cure an impermissible racial purpose.

10. The "effect" of the annexation clearly was to dilute the black vote in the City of Richmond; this has been essentially conceded by all the parties.

11. Furthermore, in view of the finding that de-annexation will not prove unduly burdensome or costly, de-annexation is the only method by which the instant impermissible racial purpose may be cured. Dissenting opinion of Circuit Judge Butzner in *Holt v. Richmond,* 459 F. 2d 1093, 1100.

12. This Court finds that the issue of racial purpose in the annexation is dispositive of this case. However, even if the City of Richmond had been able to prove the absence of an impermissible racial purpose, the City still carries the burden of proof that the annexation, as amended by the nine ward plan, does not have the effect of denying or diluting the right to vote on account of race. 42 U.S.C. 1973c; *City of Petersburg v. United States, supra.*

13. To be acceptable, any plan for dividing the City of Richmond into Council wards must eliminate the racially dilutive effect of the annexation to the greatest extent reasonably possible. *City of Petersburg v. United States, supra.*

14. The City of Richmond has presented little evidence that its nine ward plan seeks to eliminate the dilutive effect of the annexation to the greatest extent reasonably possible. Plaintiff's case has been limited primarily to proof purporting to show that it was valid or reasonable to draw a plan using a criterion referred

to as "community of interest," and maintaining the James River as an inviolate ward boundry. Whatever the legitimacy of such criteria in a traditional Fifteenth Amendment case, the situation is different in a case brought under the Voting Rights Act, where the burden of proving non-discrimination is a heavy burden upon the plaintiff. *City of Petersburg v. United States, supra.*

15. Thus the nine ward plan of the City of Richmond is rejected by this Court since the City has not shown that elimination of the dilutive effect of the black vote by the nine ward plan was properly considered by the City officials.

16. The Crusade for Voters of Richmond has not introduced sufficient evidence to show that its ward plans eliminated the dilutive effect of the annexation to the maximum extent reasonably possible. Thus, this Court is unable to accept any of the Crusade Plans as being permissible under the Voting Rights Act.

17. The recommendation of the United States with regard to acceptance to the City's nine ward plan and the City's claim of economic need are only factors to be balanced against the dilutive effect of the black vote by the annexation plan, as amended. *City of Petersburg v. United States, supra.* In fact, the City has failed to establish any counterbalancing economic or administrative benefits of the annexation on the Record in this case.

18. Consequently, as the requirements of the Voting Rights Act are most clear and compelling and have not been met by the plaintiff City of Richmond, this Court rejects its annexation plan, as amended.

19. Furthermore, the annexation plans of the Crusade for Voters of Richmond are similarly rejected.

20. De-annexation of the land acquired by the City of Richmond from Chesterfield County is mandated.[1]

/s/ LAWRENCE S. MARGOLIS
United States Magistrate
for the District of Columbia

Dated this 18th day of January, 1974.

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[1] During the course of its case, the plaintiff sought to introduce the deposition of Dr. William S. Thornton, a witness listed by the Crusade for Voters of Richmond, and later withdrawn. The various pretrial orders of the Court restricted the parties to those witnesses previously listed. Dr. Thornton was not listed as a witness by the plaintiff. Therefore, the deposition is inadmissible. Even if it were admissible, it would not alter the findings in this case.

APPENDIX D

Title 42, United States Code:

§1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such

qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Pub.L. 89-110, Title I, §5, Aug. 6, 1965, 79 Stat. 439; Pub.L. 91-285, §5, June 22, 1970, 84 Stat. 315.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed July 15, 1974

Civil Action No. 1718-72

CITY OF RICHMOND, VIRGINIA,

Plaintiff

v.

UNITED STATES OF AMERICA
and RICHARD KLEINDIENST,

Defendants

CURTIS HOLT, SR. *et al.* and
CRUSADE FOR VOTERS OF
RICHMOND *et al.*,

Defendant Intervenors

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the City of Richmond, Virginia, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final order denying plaintiff's application for a declaratory

judgement entered in this action on June 6, 1974.

This appeal is taken pursuant to 42 U.S.C. §1973c.

/s/Charles S. Rhyne

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Counsel for Plaintiff